

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1354

To be argued by
PATRICIA M. HYNES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1354

UNITED STATES OF AMERICA,

—v.—

Appellee,

AMREP CORPORATION, RIO RANCHO ESTATES,
INC., ATC REALTY CORPORATION, HOWARD
W. FRIEDMAN, CHESTER CARITY, HENRY L.
HOFFMAN, and DANIEL FRIEDMAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

PATRICIA M. HYNES,
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*Assistant United States Attorneys,
Of Counsel.*

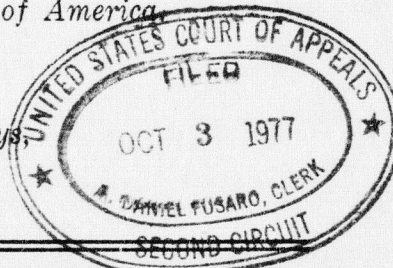




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CHESTER CARITY, HENRY L. HOFFMAN, and DANIEL
FRIEDMAN,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal from an order entered on July 21, 1977, in the United States District Court for the Southern District of New York, by the Honorable Charles M. Metzner, United States District Judge, denying defendants' motion for a writ of error *coram nobis* to vacate their judgments of conviction.

Following a ten week trial, defendants were found guilty on twenty counts of mail fraud, in violation of Title 18, United States Code, Section 1341, and five counts of interstate land sale fraud, in violation of Title 15, United States Code, Section 1703(a), relating to a

nationwide land fraud scheme as charged in Indictment 76 Cr. 644.* Judgments of conviction were entered against defendants on March 10, 1977, and thereafter were affirmed by this Court on direct appeal on August 8, 1977. *United States v. AMREP Corp., et al.*, Dkt. Nos. 77-1150-77-1156** slip op. 5157 (2d Cir. Aug. 8, 1977).

On June 22, 1977, defendants filed a motion for a writ of error *coram nobis* to vacate their convictions on the alleged ground that they had been denied their Sixth Amendment right to a jury trial because one member of the jury was not a resident of the Southern District of New York. In a Memorandum Order dated and entered on July 21, 1977, Judge Metzner denied this motion.

The individual defendants were admitted to bail pending the direct appeal from their convictions and the fines imposed against all defendants are presently being held in an escrow account pending issuance of the mandate.

Statement of Facts

Defendants were convicted of devising and engaging in a massive nationwide land fraud scheme to sell unimproved desert lots in a 91,000 acre subdivision in New Mexico, named "Rio Rancho Estates," by means of high pressure selling techniques and false, fraudulent and misleading statements as to the value of these lots as

* This indictment was filed on July 13, 1976 in eighty counts and superseded 75 Cr. 1023, filed on October 28, 1975. At trial, the Government consented to proceed on only 25 counts which were submitted to the jury. Defendants were convicted on all counts.

** On August 22, 1977, appellants filed a petition for rehearing *in banc*, which is still *sub judice* before the Court.

sound and profitable financial investments. The essence of the scheme centered around false and misleading representations concerning the direction of growth of the City of Albuquerque and the soundness of the attendant investment value attributed to the land by the defendants. The "Rio Rancho" sales pitch was carefully tailored in a nationwide sales program that defendants operated from 1961 to the filing of the indictment.

For a full statement of the facts underlying defendants' convictions, the Government respectfully refers this Court to the Government's Brief on the direct appeal at pp. 3-41. *United States v. AMREP, et al.*, Dkt. No. 77-1150.

A. Defendants' Belated Motion for a Writ of Error Coram Nobis

Trial on the indictment consumed some 10 weeks, which included 3 days of jury selection. At the time the jury was selected and sworn the defendants did not raise any objection with respect to the residency of any juror, and in particular, the juror whose qualifications are now much belatedly challenged, Ms. Rosalind Eager. Although defendants submitted a written proposed *voir dire* which requested the trial judge to inquire into the residency of each venireman (A. 3),* this inquiry was not made by the Court, nor did defendants pursue their request further at any point either prior to or after jury selection.

On June 22, 1977, some five months after defendants had been convicted, and within hours after this Court heard oral argument on the appeals from those convic-

* References to the joint appendix on this appeal are cited as "A"; "Gx." refers to Government Exhibits introduced at trial.

tions, defendants for the first time challenged the residency qualifications of juror number 2, Ms. Eager. In this motion for a writ of error *coram nobis* defendants did not claim that Ms. Eager was in any way biased or prejudiced against them, nor did defendants raise any claim as to the integrity and fairness of the jury's deliberations. Instead, defendants merely contended that they recently had learned that Ms. Eager, who otherwise was fully competent and qualified as a juror, in fact was not a resident of the Southern District of New York at the time of the trial, but was residing in Oneonta in the Northern District of New York. Defendants' motion sought issuance of the writ on the ground that this alleged violation of the Southern District residency qualifications violated their Sixth Amendment right to a jury trial. In response to defendants' claim, the Government filed an affidavit stating that the United States Attorney's Office had not made any factual inquiry into the residency of the juror in question (A. 21-22), however, assuming that Ms. Eager did reside outside of the Southern District of New York at the time she was sworn and served on the jury, defendants clearly were not entitled to a writ of error *coram nobis* to vacate their convictions.

B. The District Court's Decision

In a Memorandum Order dated July 21, 1977, Judge Metzner denied defendants' motion for a writ of error. (A. 29-30). The District Court held that even assuming *arguendo* that juror number 2 was not a resident of the Southern District of New York, defendants were not entitled to the post-conviction relief sought in their motion. Specifically, Judge Metzner determined:

"[T]he court is not required to vacate the judgments of conviction. It is clear that such a factor does not impair the impartial and intelligent per-

formance of a juror's duties. *United States v. Rosenstein*, 34 F.2d 630, 634 (2d Cir. 1929); *United States v. Haywood*, 452 F.2d 1330 (D.C. Cir. 1971).

The Southern District residency requirement for jurors is statutorily based, 28 U.S.C. § 1865 (b), and the general rule is that failure to satisfy the residency requirement is waived by a defendant after judgment is entered, even where defendant was ignorant of the fact and could have successfully objected to the juror sitting at the time of his or her examination. *Rosenstein*, supra." (A. 29-30).

ARGUMENT

The District Court Properly Denied Defendants' Motion.

On this appeal from the denial of their motion for a writ of error *coram nobis* defendants assert, as they did belatedly post-conviction in the District Court, that their richly merited convictions should be vacated because of the alleged non-residency within the Southern District of New York of a juror who otherwise was plainly satisfactory to them and against whom they level no charge of bias or partiality. To buttress an otherwise technical and unimpressive claim, defendants argue that this alleged technical defect in the juror's qualifications amounted to a constitutional deprivation of their Sixth Amendment rights and therefore, even without a claim of actual prejudice, mandates a new trial. To state defendants' contention is to demonstrate its absurdity.

It is clear that objections to the residency qualifications of a juror—like other requirements not affecting the essential impartiality and intelligence of a juror—

are waived if not made before the juror is sworn. *Kohl v. Lehlback*, 160 U.S. 293 (1895); *United States v. Rosenstein*, 34 F.2d 630 (2d Cir.), *cert. denied*, 280 U.S. 581 (1929); *United States v. Haywood*, 452 F.2d 1330 (D.C. Cir. 1971). See also, *Fisher v. Yoder*, 53 Fed. 565 (W.D. Pa. 1892). This well-settled rule is not altered by defendants' hollow attempt to argue that the Sixth Amendment's residency requirement affects a substantial constitutional right that cannot be waived without a knowing and intentional relinquishment of that right.

Thus, for example, as long ago as 1929 this Court, in *United States v. Rosenstein*, *supra*, refused to set aside a criminal conviction on the ground that one juror was not a resident of the Southern District of New York. In *Rosenstein* one of the jurors resided within the Eastern District of New York.* However, an objection to the juror's qualifications on that ground was not made until after the jury was sworn and testimony taken, when the defendant asked that the juror be withdrawn. This motion was denied. On appeal this Court affirmed the District Court's denial and held that "the time to object to a juror's qualification is before he is sworn." The Court reasoned:

"Failure to come within the statutory requirements, such as citizenship, age, property, sex, and residence, which does not go to make up the essential qualities to enable a juror to perform his duties intelligently and impartially, may be waived by a defendant, *even where such waiver consists of excusable want of knowledge*, and even though he may have successfully objected to the juror sitting at the time of his examination." (Emphasis added.) 34 F.2d at 634.

* In the present case the juror in question, Rosalind Eager, is alleged to have resided in the Northern District of New York.

The *Rosenstein* Court also rejected any constitutional basis for defendant's contention citing *Kohl v. Lehlback*, 160 U.S. 293 (1895). In *Kohl* the defendant petitioned for a writ of habeas corpus claiming that he had been denied due process and equal protection of the law because one of the jurors by whom he had been tried had been an alien. The Supreme Court rejected those arguments finding that:

"The disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if, voluntarily, or *through negligence*, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it." (Emphasis added.) 160 U.S. at 302.

Similarly, in *United States v. Haywood*, a juror had moved from the District of Columbia to Maryland. Defendant moved for a new trial on the basis of the juror's non-residence in the District of Columbia. The Court held:

"Regarding the non-residency of a juror, it is clear that such a factor does not impair the impartial and intelligent performance of a juror's duties. As a general rule, a party who fails to object to the service of a juror on grounds of residence, for whatever reason, should be deemed to have waived the objection because violations of residency requirements do not reach these 'essential qualities' of a juror. * * * And in this case, although the juror had moved to Maryland, no actual prejudice has been shown." 452 F.2d at 1332. (Citation omitted).

Kohl, Rosenstein and Haywood make clear that the rule of waiver applies even where, as here, it is alleged that the defendants did not learn of the non-residency within the district of the juror until after the juror had been sworn. Indeed, at trial defendants had available a statutory basis to seek the removal of Ms. Eager, pursuant to Title 28, United States Code, Section 1865(b)(1), and had they pressed for an inquiry into the residence of any panel member during the actual jury selection they surely would have learned of what they now allege were the pertinent facts. Under such circumstances, the District Court's finding of a waiver of this issue clearly was correct and proper, regardless of whether defendants' waiver was "knowing and intelligent." Cf. *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963); See also, *Francis v. Henderson*, 425 U.S. 536 (1976); *Davis v. United States*, 411 U.S. 233 (1973).*

Defendants assert that notwithstanding their failure to have persisted in an effort to ascertain the residency of Ms. Eager, to challenge her before she was sworn, and the absence of any claim of bias or prejudice, the importance of the Sixth Amendment right to a trial by jury of the "state and district" compelled the District Court to grant the post-conviction relief sought by their motion. This novel contention, however, is not supported by

* Defendants' claim that they preserved this issue by submission prior to jury selection of *voir dire* requests is misguided. While Judge Metzner did not inquire of any panel member as to his or her residence, defendants never asked him during the jury selection to make such an inquiry of any venireman. This failure on defendants' part points up their utter lack of interest in the statutory or constitutional residence requirements and makes manifest that the present motion was no more than a last ditch desperate effort to avoid execution of the sentences imposed by Judge Metzner in the judgments of conviction already affirmed by this Court.

citation to any case in point * and obviously cannot withstand analysis in the light of other cases which have refused to grant relief on constitutional grounds even where a more serious attack was made with respect to the right of a defendant to be tried by an impartial jury. See, e.g., *United States v. Ragland*, 375 F.2d 471, 475 (2d Cir. 1967). Cf. *Raub v. Carpenter*, 187 U.S. 159 (1902).** The conclusion that defendants received a

* Defendants rely upon *Williams v. Florida*, 399 U.S. 78 (1970) and *Zicarelli v. Gray*, 543 F.2d 466 (3d Cir. 1976) (*in banc*), to establish the important historical interests in the so-called right of a trial by jury of the vicinage as found in the Sixth Amendment. Neither of these decisions, however, deal with the question presented here—the waiver of that right by a failure to object to the juror prior to the time he is sworn—and already decided adversely to defendants in *Kohl and Rosenstein, supra*. Moreover, however important the right of vicinage was as an historical matter and in the abstract, in the absence of a claim of bias or actual prejudice, this right does not go to the essential fairness of the jury trial and therefore does not warrant post-conviction relief in this case.

** Indeed, the cases relied on by defendants are wholly inapposite to the claim raised here. For example, in *United States v. DeAlba-Conrado*, 481 F.2d 1266 (5th Cir. 1973) the defendant, a citizen of Colombia, challenged the makeup of the jury panel because there were no Latin names on either the panel or on the selection list. The Fifth Circuit remanded the case to the district court to afford the defendant an opportunity to prove that “the jury selection process utilized in his case systematically and arbitrarily excluded a cognizable class or ethnic group from jury service to his prejudice.” 481 F.2d at 1270. The Court in *De Alba-Conrado* in remanding the case relied upon subsection (e) of § 1867 of the Jury Selection and Service Act which provides: Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

[Footnote continued on following page]

fair and impartial trial is not—and cannot—be challenged here, and the alleged non-residency of Ms. Eager simply does not go to a fundamental defect “affecting the substantial rights of the accused”. *Kohl v. Lehlback, supra*, 160 U.S. at 302.

Finally, even assuming *arguendo* that Ms. Eager was a resident of the Northern, rather than the Southern District of New York, defendants’ Sixth Amendment right to a “jury of the state and district wherein the crime shall have been committed . . .” was not violated. While the indictment here alleged specific acts in the Southern District of New York, the fraudulent scheme of which defendants were convicted transpired nationwide and, in particular, in the Northern District of New York as well as the Southern District of New York. Indeed, a very important piece of evidence at trial was a tape recording of a sales training session conducted by Sid Hollander, a regional sales manager for AMREP, in which Hollander instructed salesmen on the manner and method of convincing prospective buyers to make their purchase. The tape contains the following passage:

Obviously, *DeAlba-Conrado* involved a much more serious and fundamental question with respect to the inherent unfairness in the jury selection procedures followed there and has no bearing on this case.

Defendants’ reliance on *United States v. McCorkle*, 248 F.2d 1 (3d Cir.), *cert. denied*, 355 U.S. 875 (1957) is likewise wholly misplaced. *McCorkle* involved the question of a juror’s impartiality and bias. In the *McCorkle* case, the defendant was charged with armed robbery which resulted in the murder of a special police officer who was escorting the manager of a food store to a bank to make a nightly deposit. A juror who sat on the case was a night manager of a Western Union Office, and he had been robbed while making a nightly deposit. That robbery took place some seven months prior to the robbery for which defendant was indicted. The juror also had a police escort when making those nightly deposits. The juror failed to reveal this information in response to questions on *voir dire*. The Third Circuit remanded the case to the District Court for the issuance of a writ of habeas corpus finding that “the facts demonstrate bias to the extent that it voids the process.” 248 F.2d at 6.

"I took a team of nine people in Syracuse, New York.* Not one of them had ever been in the land business before except the manager. * * * So the first month that Syracuse was in operation . . . And Mr. Smith, you know this to be a fact. These are not stories that I'm telling you. They wrote 175,000 worth of business. The second month they were in business they're already down to 160,000. Next month, I figure they'll do about 140,000. Then I'll have to go back in there and tell them not to be smart any more, and they'll go back up to 175,000." (669A; A**10545-46)

Thus, it is evident that even under defendants' highly technical argument, the trial of their massive nationwide fraud scheme by a jury, one of whose members was not a resident of the Southern District of New York but of another district where the crimes occurred, did not violate defendants' Sixth Amendment right to a trial by jury of the "state and district wherein the crime shall have occurred."

In sum, defendants have not proffered any basis whatsoever for setting aside their convictions, and their failure to have objected timely to Ms. Eager's alleged residence outside of the Southern District, as well as the lack of any claim of bias or partiality, fully justified the District Court's denial of their motion for a writ of error *coram nobis*.

* Syracuse is in the Northern District of New York.

** This specific reference is to the joint appendix on the direct appeal in this case.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
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PATRICIA M. HYNES,
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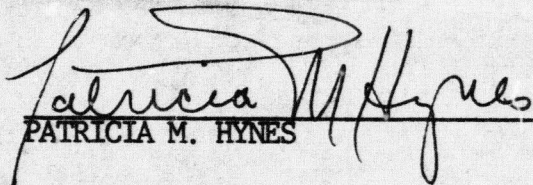
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PATRICIA M. HYNES, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of October, 1977 she served a copy of the within Brief for the the United States of America by placing the same in a properly postpaid franked envelope addressed:

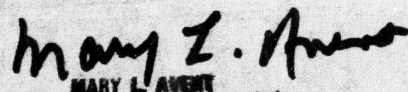
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PATRICIA M. HYNES

Sworn to before me this

4th day of October, 1977


MARY L. AVENI
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979

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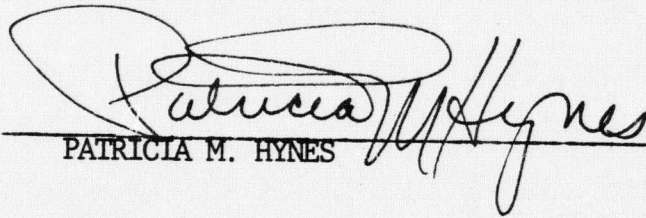
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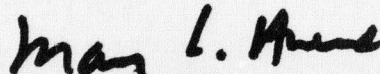
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And deponent further says that she sealed the said envelope
and placed the same in the mail chute drop for mailing at
One St. Andrew's Plaza, Borough of Manhattan, City of
New York.


PATRICIA M. HYNES

Sworn to before me this

4th day of October, 1977


MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979